

7 PERC ¶ 14107

HEERA UNIT DETERMINATION - LIBRARIANS

California Public Employment Relations Board

**In the Matter of: Unit Determination for Professional Librarians of the University
of California Pursuant to Chapter 744 of Statutes of 1978 (Higher Education
Employer-Employee Relations Act)**

Docket No. SF-PC-1001 et al.

Order No. 247b-H

March 23, 1983

HEERA Unit Determination (Librarians)

Before Tovar, Jaeger, Morgenstern and Burt, Members

HEERA -- Librarians' Unit -- Supervisory Exclusions -- -- 16.32, 33.42 University's professional librarians, who: (1) were authorized to hire or who made effective recommendations regarding hiring; and (2) were responsible for annual and probationary performance evaluation of subordinates, were supervisory employees within meaning of HEERA.

HEERA -- Librarians' Unit -- Supervisory Exclusions -- -- 16.32, 33.42 University's professional librarians who supervised only nonunit employees for, at most, 10 percent of their time, were not supervisory employees where their supervisory activity was incidental to their professional activities, and was not carried out essentially in employer's interest.

HEERA -- Librarians' Unit -- Managerial Exclusions -- -- 16.12, 33.41 University's librarians were managerial employees where they: (1) were solely responsible for overall operation of their units; (2) had individual responsibility to develop and administer important policies and programs pertaining to their units; (3) exercised discretionary authority in developing and modifying institutional goals and priorities; and (4) performed several duties indicating substantial responsibility in developing, administering and modifying unit budgets.

HEERA -- Confidential Status -- Labor-Nexus Test -- -- 16.22, 33.43 Under HEERA, confidential status is limited to: (1) those employees who assist and act in confidential capacity to persons who formulate, determine and effectuate management policies in field of labor relations; and (2) persons who, although not assisting person exercising managerial functions in labor-relations area, regularly have access to confidential information concerning anticipated changes that may result from collective negotiations.

HEERA -- Librarians' Unit -- Casual Employees -- -- 16.452, 33.343, 34.392 Mere fact that temporary librarians did not work sufficient number of days or percent of time to qualify for participation in university retirement system did not, standing alone, indicate that temporary librarians did not share community of interest with other unit members. Further, although temporary employees were not guaranteed continued employment, neither were they precluded from reappointment. Therefore, since temporary librarians were subject to same library policies and procedures, same pay and promotion structure, working conditions and disciplinary rules, they were included in unit with regular librarians.

APPEARANCES:

Philip E. Callis, Attorney for California State Employees Association; Robert J. Bezemek, Attorney (Bennett & Bezemek) for the American Federation of Teachers; Douglas H. Barton, Attorney (Corbett, Kane, Berk & Barton) and James N. Odle, Associate Counsel for the Regents of the University of California.

DECISION

On September 30, 1982, the Public Employment Relations Board (PERB or Board) issued a decision¹ under the Higher Education Employer-Employee Relations Act (HEERA)² creating a bargaining unit of professional librarians for employees at the University of California (UC). Pending that decision, exclusionary issues were raised by the parties with respect to the alleged managerial, supervisory, confidential and casual status of employees in the professional librarians unit, as well as several other proposed UC units. The hearing on these exclusionary issues began on July 14, 1982. See *Unit Determination for Employees of the Regents of the University of California* (9/4/81) PERB Order No. Ad-114-H and (4/20/82) PERB Order No. Ad-114a-H. It soon became apparent that the development of the record for this and related UC units would be an unduly lengthy and complex process since a total of approximately 7,000 exclusionary issues were involved. As a result, on August 4, 1982, during testimony pertaining to another unit, the Board ordered the hearing suspended pending further procedural orders. *Under Determination for Employees of the Regents of the University of California* (8/4/82) PERB Order No. Ad-114b-H. Thereafter, on August 12, 1982, the director of representation issued a pre-hearing notice and order for investigation, production of documents, and hearing. See *Unit Determination for Employees of the Regents of the University of California (Exclusionary Phase)* (9/14/82) PERB Order No. Ad-114c-H. This order directed UC to submit declarations and relevant supporting documents to support each whole classification (List A submission) and each individual employee (List B submission) exclusionary claim. The order provided that the documentation submitted by UC should be legally sufficient to constitute its case-in-chief for all disputed classifications and employees.

The employee organizations were directed to review the material submitted by UC and to submit counter-declarations and relevant documents where they opposed UC's exclusionary claims. The employee organizations were advised that a failure to file counter-declarations would be deemed a waiver of opposition to the claim unless opposition was stated on the ground that a *prima facie* case was not established by UC. The parties were then advised that PERB would examine the disputed claims on the basis of the totality of materials submitted by the parties to determine whether a sufficient case was presented for decision by the Board itself, or whether further investigation or formal hearing would be required to resolve disputed issues of fact.

As a result of the procedural history described above, the record in this matter substantially consists of declarations submitted by UC and the American Federation of Teachers (AFT).³ AFT's and California State Employees Association's (CSEA) cases consist mainly of the argument that UC's documentation is insufficient to establish a *prima facie* case for exclusion. Therefore, they contend, none of the claimed exclusions should be allowed. The record also consists of the transcript and exhibits in the matter of the *Unit Determination for Professional Librarians of the University of California, supra*, PERB Decision No. 247-H, including class specifications, job descriptions, the staff personnel manual and salary schedules. As discussed, *infra*, the record in some cases establishes and in some cases does not establish a *prima facie* case sufficient to exclude the disputed classifications and employees.

As part of their responses to PERB's request for argument, CSEA and AFT submitted a joint list of 58 librarians whom they agree should be excluded from the unit as supervisory. These employees are listed in Appendix A attached hereto. Although not formalized in a written agreement, this list is tantamount to a stipulation with UC. The Board has held that it will approve

a stipulation in a unit determination matter when the stipulation does not contravene the Act or establish Board policies. *Centinela Valley Union High School District* (8/7/78) PERB Decision No. 62. A review of the record reveals that it is adequate to support the stipulations. Therefore the stipulations are approved by the Board.⁴

DISCUSSION

The terms "managerial employee," "supervisory employee" and "confidential employee" are defined in subsection 3562(1),⁵ section 3580.36 and subsection 3562(e)⁷, respectively.⁸ The definitions in these sections of HEERA essentially parallel the definitions of managerial, supervisory and confidential employees found in the State Employer-Employee Relations Act (SEERA).⁹

In deciding this case, we find no reason to depart from the Board's conclusions regarding exclusionary issues set forth in *Unit Determination for the State of California Pursuant to Chapter 1159 of the Statutes of 1977 (State Employer-Employee Relations Act)* (12/31/80) PERB Decision No. 110c-S.1010. Thus, we conclude that the burden of proving an exclusionary claim rests with the party asserting it.¹¹ Stipulations of fact submitted by the parties are accepted as conclusive. Additionally see the detailed discussion regarding managerial and supervisory employees in *Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory, of the University of California Pursuant to Chapter 744 of Statutes of 1978 (Higher Education Employer-Employee Relations Act)* (3/8/83) PERB Decision No. 246b-H, at p. 8 *et seq.*

As was stated in this case, the Board's analysis according to the principles established in the SEERA unit determination decision has been complicated because the record provides few direct facts regarding the amount of time the employees in issue perform duties substantially the same as those of their subordinates, or whether the exercise of supervisory duties is sporadic and atypical or requires the use of independent judgment. Absent such facts, the evidence must be conservatively approached. Thus, the point at which an employee's supervisory obligation to the employer outweighs the entitlement to the rights afforded rank-and-file employees will be reached only where the record indicates the substantial performance of supervisory duties. Additionally, certain supervisory duties may indicate a serious potential for a conflict of interest with bargaining unit members and thus require the exclusion of the employee.

ORGANIZATION OF THE UC LIBRARY SYSTEM

An overview of the UC library system is essential in order to accurately apply the exclusionary criteria set forth in the statutes.

The system is complex, consisting of at least one main library and often several branch libraries on each University campus. In addition, there are 10 unaffiliated libraries located in various academic departments.¹²

The upper echelon of management at a main or branch library consists of the university librarian who heads the facility, and the assistant university librarians and associate university librarians who work directly under him or her. Incumbents in these positions share the top-level management responsibilities of their respective libraries. None of these positions were placed in the professional librarians unit established by the Board.

The second echelon of library employees are grouped in the following descending series with titles as follows: librarian, associate librarian and assistant librarian. Incumbents in these positions are at the crux of this dispute. An appointment to a position in any title in this series falls within one of three categories: career, potential career, or temporary.¹³ A potential career appointment is distinguished from a temporary appointment by the fact that no definite date of termination of the appointment is specified. Additionally, only appointees in potential career appointments may qualify, after a trial period and careful review, for a continuing career appointment.

Generally, librarians work in one of two departments--public service or technical service. Public service deals with reference materials and the circulation of library materials. Approximately 70 percent of the librarians are assigned to the public service branch of each campus. They have significant contact with students, faculty and researchers. Technical service relates to the acquisition and cataloging of the library collection. Librarians in the technical service branch have contact with administrative professionals such as computer programmers and analysts.

EXCLUDED SUPERVISORY EMPLOYEES

Following the parties' agreement to the exclusion of the employees listed in Appendix A, 127 employees in the librarians unit remain in dispute.¹⁴ UC has designated 121 of these employees as supervisors.¹⁵ The evidence submitted by UC in support of excluding each of these individuals is largely identical in content and specificity.

The record does not provide a detailed account of the day-to-day duties of any librarians. Absent rebutting evidence, however, the Board finds that UC has established in most instances a *prima facie* case for exclusion. The excluded employees are listed in Appendix B attached hereto.

While there are slight variations in the record regarding Appendix B employees, the following general statements hold true. With regard to authority to hire, Appendix B employees either select from a pool of applicants the individuals to be hired into their work unit, or make recommendations with regard to the hiring of job applicants that are routinely followed. Further, Appendix B employees are responsible for the annual and probationary performance evaluations of their subordinates. With respect to probationary employees, the performance evaluations are critical to a determination that the employees will either be retained or discharged. The combination of these duties indicates that Appendix B employees play a significant role in hiring decisions which affect their subordinates.

The record shows that some Appendix B employees are directly responsible for merit salary increase and promotion decisions or make recommendations in these matters which are routinely followed. In numerous other areas, including discipline and grievances, Appendix B employees have either the authority to take action or to recommend effectively a solution or action. It is not necessary to state categorically that any of the foregoing duties would alone establish supervisory status. Taken as a whole, the many and various responsibilities are sufficient to establish supervisory status. This especially so because the evidence in favor of exclusion is un rebutted.

CSEA and AFT argue that, notwithstanding the evidence of supervisory authority, the employees designated by UC as supervisors should not be excluded from the unit for two reasons. First, they perform work substantially similar to that of their subordinates and, second, they supervise only employees who are not members of the unit. However, with the exception of the two employees discussed, *infra*, there is no evidence in the record to support the claim that they perform work substantially similar to that of their subordinates. Similarly, the record does not indicate that their supervisory duties are limited to nonunit employees. Further, the fact that supervisors supervise only nonunit employees does not preclude designation of them as supervisory.¹⁶

In conclusion, the Appendix B employees are excluded from the unit on the basis that there has been an un rebutted *prima facie* showing that they are supervisors within the meaning of section 3580.3.

APPENDIX C EMPLOYEES INCLUDED

AFT submitted two counter-declarations to support the inclusion of two employees. The declarants are Stanley Stevens, an associate librarian (3616) at the Santa Cruz library, special services section, map unit; and Raymond Philip Hoehn, Jr. (3612), a map librarian, government documents department at UC Berkeley. The evidence indicates that Mr. Stevens is responsible for the physical environment of the map room, equipment and supplies. These responsibilities occupy 80 percent of his time. Supervision of three nonunit employees occupies approximately 10

percent of his time. Mr. Hoehn's responsibilities include acquiring, cataloging and providing reference services for cartographic materials. Ninety percent of Mr. Hoehn's time is spent doing these duties and five percent is spent representing the unit at various meetings. Supervision of two nonunit employees occupies approximately five percent of his time.

The record reflects that Hoehn and Stevens are professionals who spend, at most, 10 percent of their time on supervision, that such supervision is exercised over nonprofessional employees who are not in the unit petitioned for, and that the supervised employees are performing work which is merely adjunct to the professional duties of Hoehn and Stevens. Such supervisory activity is incidental to their professional activities, and is not carried out essentially in the interest of their employer. *Redlands Unified School District* (8/27/82) PERB Decision No. 235. It is this combination of factors which persuades us that their inclusion would not present a danger of conflict of interest within the unit, and that their infrequent exercise of supervisory authority is insufficient to ally their interest with management so as to create the more generalized conflict of interest which the Legislature sought to avoid when it declared that supervisors are to be excluded from rank and file units. This rationale was expressed as follows by the National Labor Relations Board in *Adelphia University* (1972) 195 NLRB 639, 644 [79 LRRM 1545]:

The underlying rationale of this body of precedent is that an employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress

Mr. Stevens and Mr. Hoehn are therefore included in the unit, as indicated in Appendix C attached hereto.

A handful of the employees designated by UC as supervisors simply do not possess the requisite supervisory authority to warrant their exclusion from the unit. These employees are listed in Appendix C. The record reveals that these employees have, at the most, only advisory power in matters of hiring, transfers, salary increases, promotions, discipline and grievances. Viewing the record as a whole, the evidence presented on these employees does not establish a *prima facie* case for exclusion. Thus, we find Appendix C employees to be appropriately included in the unit.

MANAGERIAL EMPLOYEES

UC seeks to exclude 16 employees from the unit as managerial. Ten of these 16 employees have been excluded as at least supervisory pursuant to the parties' agreement.¹⁷ The remaining six employees are incumbents in three classifications.¹⁸

The six employees designated by UC as managerial perform virtually the same duties. The record reveals that these employees are solely responsible for the overall operation of their units. They also have individual responsibility to develop and administer important policies and programs pertaining to their units. They exercise discretionary authority in developing and modifying institutional goals and priorities. Moreover, they perform a number of duties indicating substantial responsibility in developing, administering and modifying the unit budget.

Absent contrary evidence, the Board concludes that these employees, listed in Appendix D attached hereto, have significant responsibilities for both formulating and administering UC policies and programs. Therefore, they are excluded from the unit as managerial.

CONFIDENTIAL EMPLOYEES

Subsection 3562(e) of HEERA provides that a confidential employee is one who is required to develop or present management positions with respect to "meeting and conferring." this term, like the term "employer-employee relations" in section 3513(f) of SEERA, includes, at the least, the

processing of employee grievances and employer-employee negotiations.¹⁹ Subsection 3562(e) also provides that a confidential employee is one whose duties normally require access to confidential information which contributes significantly to the development of management positions.

The frequency with which an employee has access to or possesses information of a confidential nature is not controlling. However, it must be in the regular course of the employee's duties and more than a happenstance.²⁰ Specifically, the Board has stated:

The mere access to or possession of confidential information by an employee will not, however, in and of itself result in that employee's designation as confidential. A confidential employee must function as such in the regular course of his or her duties before the denial of representation rights that accompanies such classification is justified. [Footnote omitted.]²¹

In sum, more than a fraction of the employees' time must be spent on confidential matters.²² The individual must have access to or possess sufficient information to warrant the conclusion that the employer's ability to negotiate with employees from an equal posture might be jeopardized, and the balance in employer-employee relations distorted, if the information was prematurely made public.²³

The Board has also stated that:

The assumption is that the employer should be allowed a small nucleus of individuals who would assist the employer in the development of the employer's positions for the purposes of employer-employee relations

. . .

. . . the employer, in order to fulfill its statutory role in its employer-employee relations, must be assured of the undivided loyalty of a nucleus of staff designated as "confidential employees."²⁴

Section 3562(e) thus contemplates a small number of confidential employees working at the most knowledgeable levels in the areas of bargaining and grievance processing.

UC contends that the evidence submitted in support of the exclusion of claimed managers and supervisors from the professional librarians unit also proves that nearly all of these individuals also meet the criteria for exclusion on the basis of confidential status set forth in subsection 3562(e).²⁵ In fact, UC submitted evidence pertaining to the alleged confidential status of all except 16 of its claimed managers and supervisors.

To exclude all of these employees as confidential would hardly create a "small nucleus" of employees who develop or have access to confidential information with respect to meeting and conferring. In drafting subsection 3562(e), the Legislature cannot have intended that the 169 librarians should all be excluded as confidential. In discussing the limited exclusion of confidential employees, the United States Supreme Court has recently noted that professional employees are nearly always likely to be privy to some confidential business information relating to bargaining and grievance issues. However, if such employees were all designated confidential, that basis for exclusion would "swallow up and displace almost the entirety of the professional-employee inclusion." *NLRB v. Hendricks County Rural Electric Membership Corp.* (1981) 454 U.S. 170 [108 LRRM 3105, 3110]. Instead, based on the National Labor Relations Board's "labor-nexus test," confidential status is limited to (1) those employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations, and (2) persons who, although not assisting persons exercising managerial functions in the labor-relations area, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. *Id.*, 108

LRRM at 3109-3112.

The evidence does not indicate that any of the librarians satisfies the labor-nexus test. For example, nearly all the disputed employees attend meetings where management positions and/or strategy with respect to collective bargaining matters are discussed. The fact that well over 100 librarians attend such meetings in itself reveals that the information discussed at such meetings is not confidential.

Further, the evidence presented is not sufficient to establish, without further support, that more than a fraction of the disputed employees' time is spent on the alleged confidential matters. It is apparent that the participation of these employees in bargaining and grievance matters is only incidental to their regular responsibilities in the library. Absent a showing of significant involvement in confidential matters, none of the disputed employees qualifies for confidential status.

In conclusion, nothing in the record establishes that these librarians are part of the small nucleus of individuals who are actively involved in collective negotiations and grievance resolution at the highest levels, or that they regularly perform confidential duties. Given the narrow definition of confidential employee, the lack of evidence regarding the performance of confidential duties by librarians, and the apparent infrequency of performance of any duties which might exist, none of the disputed employees can be excluded from the unit as confidential.

CASUAL EMPLOYEES

Casual employees are those who, due to their sporadic or intermittent relationship with the employer, lack a sufficient community of interest with regular employees to be included in the representational unit. *Unit Determination for Employees of the California State University and Colleges Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act)* (9/22/81) PERB Decision No. 173-H; citing *Mission Pak Co.* (1960) 127 NLRB 1097 [46 LRRM 1161]. In considering the status of alleged casual employees and the appropriateness of excluding them from the librarians unit, we are required to consider the following criteria set forth in section 3579 of HEERA which, in pertinent part, provides:

(a) In each case where the appropriateness of a unit is an issue, in determining an appropriate unit, the board shall take into consideration all of the following criteria:

(1) The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with the employer, the extent to which such employees belong to the same employee organization, the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements, and the extent to which the employees have common supervision.

In addition to the above statutory criteria, the Board has consistently held, in accordance with other jurisdictions, that such factors as qualifications, job function, compensation, hours of work, fringe benefits, integration of work function, and interchange between employees are relevant in determining community of interest.²⁶ As stated in *Monterey Peninsula Community College District, Id.*,

. . . community of interest is not determined by going down a check list of these factors. The point of the comparison is to reveal the interests of the employees and ascertain whether they share a substantial mutual interest in matters subject to meeting and negotiation. (Citation omitted.) The interests of included employees must be mutual not distinct, and substantial not tenuous. Thus,

employees may be excluded from a particular unit either because their interests are separate and apart from those of the employees in that particular unit, (citation omitted) or because their interest in negotiable matters subject to the control of the employer is so insubstantial that they do not share mutual interests with other unit employees. (PERB Decision No. 76 at p. 13.)

UC has designated three job classifications in the librarians unit which it claims are designed for use exclusively by employees who have a casual employment relationship with the university. These classifications are temporary librarian (3614), temporary associate librarian (3618) and temporary assistant librarian (3622).

UC makes two arguments with regard to alleged casual employees. It first contends that any employee in these three classifications who does not qualify for membership in one of the several retirement systems for which university employees may be eligible should be deemed casual and excluded from the bargaining unit. Generally, the requirements for membership in these systems are that a university employee must work more than 50 percent time and that the appointment be of more than a year's duration. UC argues that only employees who meet these criteria for retirement system participation have sufficient employment interests to warrant their inclusion in the bargaining unit.

UC, in essence, is attempting to define a point at which an employee's relationship with the university is transformed from intermittent and sporadic to substantial and continuing. If an employee works a sufficient percent of the time and length of time to qualify him for participation in a university retirement system, then UC contends that the individual is not casual. If the employee fails to reach the qualifying plateau, then UC contends that the status of that person should *per se* be casual.

The Board has specifically rejected such an approach. In *Dixie Elementary School District* (8/11/81) PERB Decision No. 171, the Board modified an existing unit of regular full-time, substitute and temporary teachers by including certain unrepresented day-to-day substitutes and temporary teachers. The Board noted that there was:

. . . no indication that the [petitioned-for] teachers' interest and commitment to, or empathy with, the concerns of others within the bargaining unit is proportional to their number-of-days-employment. Moreover, to impose a threshold requirement for inclusion in the unit based on number-of-days-employment would be inevitably arbitrary [footnote omitted]. There is no rationale instructing where the line establishing the minimum should be drawn. Accordingly, this Board does not require, as a condition of unit membership, that a classroom teacher work for a specified number of days. (PERB Decision No. 171 at pp. 7-8.)²⁷

Additionally, the Board has rejected the argument that less than 50 percent part-time employment alone should automatically result in the casual designation of an employee. See *Belmont Elementary School District, Id.*, EERB Decision No. 7; *Paramount Unified School District* (10/7/77) EERB Decision No. 33.

The mere fact that an employee does not work a sufficient number of days or percent of time to qualify for participation in a university retirement system does not, in and of itself, indicate that the employee does not share a community of interest with other unit members. The record reveals that the claimed casual employees may perform duties similar to those of career or potential career employees; receive the same rates of pay; have the same qualifications, skills and education; work the same shifts; report to the same supervisors; and receive roughly equivalent benefits. Absent evidence to the contrary, there is no reason to believe that such an employee does not share a substantial community of interest with other unit employees. Ineligibility to participate in one of the university retirement systems is not, by itself, enough to persuade us

differently.

UC secondly argues that, if the Board does not adopt the retirement system eligibility criterion, individuals in the three classifications claimed as casual should be excluded from the librarians unit because they lack an expectation of continuing employment with the university. UC cites a host of NLRB cases for the proposition that employees who lack a "reasonable expectation of future reasonably regular employment" should be excluded as casual. *Connecticut Distributors Inc.* (1981) 255 NLRB 1255, 1262 [107 LRRM 1229]; see also *J.R. Simplot Food Processing Division Inc.* (1960) 128 NLRB 1391 [46 LRRM 1484]; *American Federation of State, County and Municipal Employees* (1976) 224 NLRB 1057 [93 LRRM 1137]; *Advanced Mining Group, Division of Republic Corp.* (1982) 260 NLRB No. 73 [109 LRRM 1281]. In all of these cases, however, employees were excluded as casuals either because the parties had virtually agreed to their exclusion, or because the durations of the employees' appointments were extremely limited. This is not the case for the alleged casual employees in the librarians unit.

Although employees in these temporary classifications have apparently no reason to rely on reappointment, their relationship to the university and other unit members is far from limited. They may be appointed full-time to their positions for up to two years in the same capacity as other unit members. Thereafter nothing precludes reappointment. Their work is career oriented and presumably approached with the same professional goals and expectations that all unit employees possess. They are subject to the same library policies and procedures, the same pay and promotion structure, the same working conditions, and the same disciplinary rules. Based on these facts we find that the employees in the alleged casual classifications possess a significant community of interest with other unit members, and therefore, should be included in the unit.

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

- (1) The employees listed in Appendix A are excluded from the Professional Librarians Unit according to the agreement of the parties and based upon the factual record in this proceeding.
- (2) The employees listed in Appendices B and D are excluded from the unit as supervisory or managerial for the reasons stated in the foregoing Decision.
- (3) The employees listed in Appendix C are included in the unit for the reasons stated in the foregoing Decision.
- (4) No employees are excluded from the unit as confidential for the reasons stated in the foregoing Decision.
- (5) The classifications of temporary librarian (3614), temporary associate librarian (3618) and temporary assistant librarian (3622) are not casual and are included in the unit for the reasons stated in the foregoing Decision.
- (6) Any technical errors in this Order shall be presented to the director of representation who shall take appropriate action thereon in accordance with this Decision.

¹ *Unit Determination for Professional Librarians of the University of California Pursuant to Chapter 744 of Statutes of 1978 (Higher Education Employer-Employee Relations Act)* (9/30/82) PERB Decision No. 247-H. See also the decision concerning requests for reconsideration and judicial review, *Unit Determination for Technical Employees; Clerical Employees; Service Employees, Professional Scientists and Engineers, Lawrence Livermore National Laboratory; Professional Librarians; and Professional Patient Care Employees of the University of California Pursuant to Chapter*

744 of the Statutes of 1978 (*Higher Education Employer-Employee Relations Act*) (2/4/83) PERB Decision Nos. 241a-H and 244a-H through 248a-H.

2 The HEERA is codified at Government Code section 3560 *et seq.* All statutory references are to the Government Code unless otherwise specified.

3 Specifically, UC submitted 189 declarations in support of managerial, supervisory, confidential and casual exclusions. AFT responded with two counter-declarations disputing UC's supervisory claims and CSEA with none.

4 The Board does not specifically designate these employees as supervisors. In the *State Employer-Employee Relations Act, Phase III, Unit Determination Proceeding* (10/18/79) PERB Order No. Ad-79-S, the Board stated that it:

. . . views the focus of the Phase III unit determination proceedings to be a determination of those rank and file employees who are to be *included* in the designated appropriate units. However, the burden is on the . . . party which may seek to exclude employees from units because of alleged managerial, supervisory or confidential status--to affirmatively justify their exclusion. This can be done by showing evidence of actual job requirements which would disqualify the subject employees from placement in representation units irrespective of which exclusionary category those employees may fit.

Thus, the Board approves only the exclusion of the employees from the unit and not the specific basis for the exclusion.

5 Subsection 3562(1) provides:

"Managerial employee" means any employee having significant responsibilities for formulating or administering policies and programs. No employee or group of employees shall be deemed to be managerial employees solely because the employee or group of employees participate in decisions with respect to courses, curriculum, personnel and other matters of educational policy. A department chair or head of a similar academic unit or program who performs the foregoing duties primarily on behalf of the members of the academic unit or program shall not be deemed a managerial employee solely because of such duties.

6 Section 3580.3 provides:

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. With respect to faculty or academic employees, any department chair, head of a similar academic unit or program, or other employee who performs the foregoing duties primarily in the interest of and on behalf of the members of the academic department, unit or program, shall not be deemed a supervisory employee solely because of such duties; provided, that with respect to the University of California and Hastings College of the Law, there shall be a rebuttable presumption that such an individual appointed by the employer to an indefinite term shall be deemed to be a supervisor. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

7 Subsection 3562(e) provides:

"Confidential employee" means any employee who is required to develop or present management positions with respect to meeting and conferring or whose duties normally require access to confidential information which contributes significantly to the development of such management positions.

8 Managerial and confidential employees are excluded from coverage under HEERA in subsection 3562(f). Supervisory employees have limited rights as set forth in section 3580 *et seq.*

9 The SEERA is codified at section 3512 *et seq.*

The definition of "managerial employee" in subsection 3513(e) of SEERA refers to agency or department policies or programs, does not exclude decisions relevant to courses, curriculum, personnel and other matters of educational policy, and does not include reference to department chairpersons. Subsection 3513(e) provides:

"Managerial employee" means any employee having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department.

The definition of "supervisory employee" in section 3522.1 of SEERA does not contain the department chairperson language of HEERA. Section 3522.1 provides:

"Supervisory employee" means any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

The definition of "confidential employee" in subsection 3513(f) of SEERA refers to individuals who develop or present management positions with respect to "employer-employee relations" as compared to "meeting and conferring." Subsection 3513(f) provides:

"Confidential employee" means any employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management positions.

10 *Unit Determination for Employees of the California State University and Colleges Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act)* (9/22/81) PERB Decision No. 173-H and (11/17/81) PERB Decision No. 176-H.

11 See also *In Re: The State Employer-Employee Relations Act, Phase III, Unit Determination Proceeding, supra*, PERB Order No. Ad-79-S.

12 See HEERA Unit Determination Hearings, Phase I-Exhibit 35: University of California Libraries: A Plan for Development 1978-88, at pp. 207-210. The UC Berkeley Law Library is an example of an unaffiliated library.

13 See HEERA Unit Determination Hearings, Phase I-Exhibit 34: Academic Personnel Manual at section 82-17.

14 See the discussion, *supra* at pp. 4 and 5.

15 UC has designated the remaining six employees as managers, to be discussed, *infra*.

16 As the Board pointed out in *Sacramento City Unified School District* (3/25/80) PERB Decision No. 122 at p. 13, both the Educational Employment Relations Act and the National Labor Relations Act contain the same rationale for the exclusion of supervisors from rank and file units:

. . . to protect management's interest in the undiluted loyalty of those employees to whom it delegates supervisory responsibilities and to guard against potential conflicts of interest between supervisors and the employees they supervise.

This rationale is equally applicable to HEERA.

17 Again, as was stated in footnote 4, *supra*, and in the *State Employer-Employee Relations Act, Phase III, Unit Determination Proceeding*, *supra*, PERB Order No. Ad-79-S, the focus of this decision is the determination of those employees who are to be *included* in the unit. The specific basis for the exclusion of an employee, whether it is managerial, supervisory or confidential status, is not relevant for this purpose.

18 Four are classified as a librarian-career status (3612). One is classified as an associate librarian-career status (3616). One is classified as an associate librarian-potential career status (3617).

19 *Fremont Unified School District* (12/16/76) EERB Decision No. 6, at p. 11; *Marin Community College District* (6/26/78) PERB Decision No. 55, at p. 20; *Rio Hondo Community College District* (12/28/82) PERB Decision No. 272.

Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

20 *San Rafael City Schools* (10/3/77) EERB Decision No. 32, at p. 3.

21 *Campbell Union High School District* (8/17/78) PERB Decision No. 66, at p. 4.

22 *Los Rios Community College District* (6/9/77) EERB Decision No. 18, at p. 21.

23 *Campbell Union High School District*, *supra*, PERB Decision No. 66, at p. 4.

24 *Sierra Sands Unified School District* (10/14/76) EERB Decision No. 2, at pp. 2-3.

That case was decided under subsection 3540.1(c) of the EERA, which provides:

"Confidential employee" means any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations.

25 UC did not claim the exclusion of any employee in the librarians unit exclusively on the ground that the employee is confidential.

26 *Hartnell Community College District* (1/2/79) PERB Decision No. 81; *Monterey Peninsula Community College District* (10/16/78) PERB Decision No. 76. See also *Kalamazoo Paper Box Corp.* (1962) 136 NLRB 134 [49 LRRM 1715].

27 Temporary employees were also included in a bargaining unit of teachers in *Belmont Elementary School District* (12/30/76) EERB Decision No. 7, based on similar working conditions and employment as part of the regular faculty pool.
